McClatchy Newspapers, Inc., Publisher of The Sacramento Bee *and* Northern California Newspaper Guild, Local 52, the Newspaper Guild, AFL–CIO, CLC. Case 20–CA–21429

August 27, 1996

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The issue in this proceeding on remand from the United States Court of Appeals for the District of Columbia is whether the Respondent violated Section 8(a)(5) and (1) and 8(d) by unilaterally changing wages of bargaining unit employees after having bargained to impasse on its proposal to institute a wholly discretionary merit pay plan.[1]

The critical facts, as viewed by the court, are summarized below.[2]

Respondent McClatchy Newspapers, Inc., publishes The Sacramento Bee, the largest daily and Sunday newspaper in Sacramento, California. Northern California Newspaper Guild, Local 52, the Newspaper Guild, AFL–CIO, CLC (the Guild), represents several hundred employees in a bargaining unit at this newspaper, including editorial, advertising, and telephone switchboard employees. The parties have had a long-term collective-bargaining relationship, and their most recent collective-bargaining agreement, in effect from April 14, 1984, to April 13, 1986, provided for salary minimums and step increases according to specified job classifications. The agreement also included a merit increase pay system for each employee who had reached the top of his or her wage schedule and had worked at the newspaper for more than 1 year. This system allowed employees to appeal merit pay determinations and to request Guild representation in this process. The Guild under this agreement had the right to comment generally on the merit review process and it was to be notified within 10 days of the results of any particular evaluation. It was permitted, when requested, to participate in an individual's appeal of a merit increase decision. However, the Respondent retained ultimate discretion over the timing and amount of individual merit increases, and the Respondent's determinations on merit increases were not subject to the collective-bargaining agreement's grievance and arbitration provisions.

On February 13, 1986, 2 months before the then-current collective-bargaining agreement was to expire, the parties began negotiations for a successor contract. The parties' wage proposals sought diametrically opposed modifications to the contract provisions. The Guild requested a 25-percent wage increase, elimination of the merit pay system, and integration of cost-of-living adjustments into the step structure, while the Respondent proposed eliminating the guaranteed minimums and the step structure and, as a corollary, sought the right to make merit increases exclusively, without notice to or participation by the Guild.

The parties initially limited bargaining to noneconomic issues, but on November 11, 1986, after approximately 20 meetings, the parties returned to the wage proposals. These discussions were not fruitful, and in December the parties obtained a Federal mediator to assist them in the stalemated negotiations. Bargaining continued into the following February, but no agreement was reached. At the February meeting, the Respondent made a ''last, best, and final offer'' that would establish guaranteed minimum wages at the current levels and change the wage increase structure so that—with the exception of certain ''grandfathered'' employees who would be allowed to progress through experience-based steps to the maximum set by the old contract for their job classification—wage increases would be given *only* under the merit increase system. The Guild had previously rejected this proposal because only 10 percent of unit employees (the ''grandfathered'' employees earning less than the maximum of their previous salary scales) would be guaranteed any wage increase during the term of the agreement, and the Respondent would have virtually total control of any additional increases. The proposal also retained procedural provisions of the existing merit pay plan that exempted all pay decisions under the program from contractual grievance and arbitration procedures

[1] On September 27, 1990, the National Labor Relations Board issued its Decision and Order (299 NLRB 1045) in this proceeding, finding that McClatchy Newspapers, Inc. (the Respondent), violated Sec. 8(a)(5) and (1) by unilaterally implementing merit pay increases without having previously bargained about the timing and amount of increases.

The Newspaper Guild (the Charging Party) filed, and subsequently withdrew, a petition for review of the Board's Order with the United States Court of Appeals for the District of Columbia, and the Board cross-petitioned for enforcement of its Order. Thereafter, in an opinion dated May 15, 1992, the court (separate statements filed by Circuit Judges Edwards and Silberman; Judge Henderson concurring in part and dissenting in part) remanded the case to the Board for further proceedings, consistent with the court's opinion. *NLRB v. McClatchy Newspapers*, 964 F.2d 1153 (D.C. Cir. 1992).

By letter dated September 14, 1992, the Board notified the parties that it had accepted the remand and invited the parties to file statements of position with respect to the issues raised by the court's opinion. The Board also granted leave to the Council of Labor Law Equality (COLLE) to file an amicus brief.

The parties and COLLE filed statements of position, the Charging Party and the Respondent filed reply briefs, and the Respondent and COLLE have requested oral argument. The requests for oral argument are denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[2] See *NLRB v. McClatchy*, supra, 964 F.2d at 1154–1155. Our original decision, and the judge's decision attached thereto, provide a more detailed description of the pertinent facts.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

and placed other restrictions on the representational role of the Guild in the process.

The Guild rejected the proposal and recommended to its membership that they also act to reject the Respondent's offer. The membership did so. At the parties' last meeting on March 5, 1987, the Guild ''made counterproposals, including a return to the combined negotiated wage and merit arrangement in the expired contract.'' The Respondent countered with a proposal concerning unit exclusions. The parties reached impasse and negotiations ended. The next day, the Respondent posted its merit pay plan and other terms and conditions consistent with its final offer. The merit pay provisions in the posted offer were as follows:

> *SECTION 5 MINIMUM SALARIES*
>
> The publisher and the Guild agree to the following items concerning implementation of the Publisher's merit play plan:
>
> (a) During the life of this Agreement, there shall be no reduction, withdrawal or red circling of merit pay except as provided in Section 3.8.
>
> (b) Merit reviews will be conducted for each employee who has achieved the top minimum salary in his/her classification provided in Section 5 and who has completed at least one year of service with The Sacramento Bee. Merit pay increases will be awarded by department and classification. It is understood that some employees may not receive a merit pay increase.
>
> (c) The Publisher agrees to consider the Guild's comments, suggestions and recommendations about the merit evaluation and appeal processes, including discussions between the Publisher and the Publisher's consultant(s). However, the Publisher is under no obligation to accept those comments, suggestions and recommendations made by the Guild, nor shall those comments, suggestions and recommendations be binding upon the Publisher. To this end, starting in January 1985, the Publisher will meet with a committee of the Guild's choice to discuss the evaluation and appeal processes for each department. If either the Publisher or the Guild requests, the parties agree to meet at least once a week until work on the evaluation and appeal processes is completed.
>
> (d) April 14, 1985, the Publisher will conduct its merit evaluations of eligible employees. As employees are evaluated, their merit increase, if any, shall go into effect on the date designated by the Publisher. All initial merit evaluations shall be completed by October 11, 1985. Initial evaluations shall be conducted by seniority. The Publisher will notify the Guild within ten (10) calendar days of any evaluation and the evaluation and the results thereof. Any employee who does not receive a merit pay increase will be re-evaluated within three months of his/her initial evaluation or resolution of the appeal, which ever date is later.
>
> (e) If the employee requests, the Guild may participate with the employee in the appeal process. However, the final decision on merit pay increases, if any, shall not be subject to Section 11.
>
> (f) The Publisher will provide the Guild with a list of all bargaining unit employees on the Publisher's payroll as of November 1, 1985. This list will include the amount of merit pay increase, if any, each received. Such list shall be provided no later than November 15, 1985.
>
> (g) Employees below top scale are not precluded from seeking merit increases.[3]

Thereafter, the Respondent awarded merit pay increases to individual unit employees without prior notice to or discussion with the Guild.

Following the Respondent's unilateral grant of individual merit increases the Guild filed the instant charges. The administrative law judge found a violation of Section 8(a)(5) and (1), based on his finding, in a subsequently issued errata, on the complaint allegation that the Respondent's merit pay proposal was a permissive, rather than a mandatory, subject of bargaining. The Board affirmed the finding of a violation, but unlike the judge, found merit pay to be a mandatory subject of bargaining. The Board further found that the Respondent's proposal, like the one at issue in its then-recent holding in *Colorado-Ute*,[4] set no criteria for the amounts or timing of merit increases and also failed to provide for Guild participation, either in the initial determination of merit increases granted to particular employees or afterwards through the contractual grievance procedure.[5] The Board accordingly found that the proposal was for unlimited management discretion and was, in reality, seeking the Guild's waiver of its statutory right to be consulted over such matters under Section 8(a)(5) and (1) of the Act. The Board reasoned that, because the Guild had not agreed to the proposal, the Respondent had failed to secure the requisite waiver of the Guild's statutory right to bargain over changes that the Respondent would subsequently make in employee wages. Therefore, the Board found the Respondent was not privileged to proceed with implementation even after impasse, because implementation of the proposal entailed granting particular wage

[3] These provisions are identical to sec. 5.0 of the expired contract. Presumably the inclusion of 1985 dates was inadvertent.

[4] *Colorado-Ute Electic Assn.*, 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991).

[5] Any opportunity for the union to participate in the Respondent's appeal process relating to a merit pay award was dependent on the individual employee's inviting the participation of the Guild. As noted above, this appeal process was distinct from and not covered by the established grievance procedures.

increases unilaterally, without first notifying the Guild and offering it an opportunity to bargain over the timing and amounts of the increases. In concluding that such implementation would violate Section 8(a)(5) and (1) of the Act, the Board relied on *NLRB v. Katz*, 369 U.S. 736, 746–747 (1962), and *Oneita Knitting Mills*, 205 NLRB 500, 500 fn. 1 (1973).

The court of appeals, in separate opinions by the judges representing the majority on the panel in this proceeding, relied extensively on *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952), and rejected the Board's reliance on the ''waiver'' theory. The court, as noted, remanded the proceeding for reconsideration by the Board.The Board, having accepted the remand, has reconsidered this case in light of the court's opinion, the parties' statements of position, and COLLE's amicus brief. We adhere to our original position that the merit increase wage proposal was a mandatory subject of bargaining on which the Respondent could lawfully insist to impasse but that implementation nonetheless violated Section 8(a)(5) and (1) of the Act. As set forth below, however, our reasons for finding that implementation was unlawful differ from the Board's original analysis. In brief, we find that preservation of the integrity of the collective-bargaining process requires that we recognize a narrow exception to the implementation-upon-impasse rules, at least in the case of wage proposals, such as the one at issue here, that confer on an employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employees' rates of pay.

I. DISCUSSION

A primary objective of the Act is to require labor and management to establish working conditions jointly through the process of collective bargaining. Indeed, Section 9(a) establishes the role of a majority union as the exclusive bargaining representative for all the employees in a particular bargaining unit, and Section 8(a)(5) requires employers to bargain, which is defined in Section 8(d) as follows: ''to meet at reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment.'' An employer violates its duty to bargain by changing terms and conditions of employment without prior notice to, or consultation with, the 9(a) bargaining representative.[6]

This case focuses on the parameters of the legal requirements for good-faith bargaining with reference to an employer's reservation of managerial discretion over a mandatory subject of bargaining. This case, however, presents a fact pattern which lodges in the interstices between the type of employer conduct sanctioned as lawful in *American National Insurance*, supra, and the type of employer conduct barred as unlawful in Katz. It is our task to apply the controlling Court precedent in light of the fundamental policies of the Act and to explain why the conduct at issue here is properly deemed unlawful under Section 8(a)(5) of the Act.

In *American National Insurance*, supra, the Supreme Court held that it was lawful for an employer to insist on the retention of discretion under a management rights clause over certain mandatory subjects of bargaining.[7] That case arose in the context of a union's proposal for unlimited arbitration over all contract matters, and the employer's counterproposal for a management functions clause to exclude promotions, discipline, and work scheduling from arbitration. The Court stated (343 U.S. at 408):

> [T]he Board takes the position that employers subject to the Act must agree to include in any labor agreement provisions establishing fixed standards for work schedules or any other condition of employment. An employer would be permitted to bargain as to the content of the standard so long as he agrees to freeze a standard into a contract. Bargaining for more flexible treatment of such matters would be denied employers even though the result may be contrary to common collective bargaining practice in the industry.

The Court held, however (id. at 408–409):

> [T]he Board was not empowered so to disrupt collective bargaining practices. . . .
>
> Whether a contract should contain a clause fixing standards for such matters as work schedules or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining.

The Court in *American National Insurance*, however, was silent as to the questions of both implementation and impasse—i.e., implementation when the employer's proposed approach is *not* ''agreed upon'' at the bargaining table—and implementation upon impasse is the question now before the Board.

Katz, supra, on the other hand, involved the question of implementation of proposals involving mandatory

[6] *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1949).

[7] The General Counsel's complaint allegation in this case that the Respondent violated Sec. 8(a)(5) of the Act by bargaining to impasse over the merit pay proposal was dismissed by the Board's original order. We note that the dismissal as to that aspect of this case is fully in accord with the Court's opinion in *American National Insurance*.

subjects in the absence of bargaining impasse. The Court's opinion in *Katz* held that an employer violated Section 8(a)(5) while engaged in bargaining over terms and conditions of employment, because it unilaterally granted automatic and merit wage increases to unit employees while proposals regarding these subjects were still on the bargaining table and the parties had not reached an impasse in bargaining. In particular, the Court held that the employer's unilateral grant of merit increases to unit employees violated Section 8(a)(5) unless they were shown to be in line with the employer's longstanding practice of merit reviews, and, in effect, a mere continuation of the status quo. Noting that the merit raises were informed by a large measure of discretion, the Court found that ''there simply is no way for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.'' 369 U.S. at 746–747.

Although *Katz* does not hold that employer bargaining proposals for merit increases must themselves include procedures and criteria, the Court's introductory invocation of ''the statutory objective of *establishing* working conditions through bargaining'' (id. at 744, emphasis added), stands at odds with any assertion that an employer should be able, by means of a unilateral implementation following impasse of its discretionary merit wage proposal, to institute a practice of periodically granting such wage increases without any known procedures or criteria for reaching these determinations. When a union has withheld its agreement to such a wage increase system, the employer's subsequent unilateral determinations making changes in the wages of individual unit employees amount to changes in terms and conditions of employment that are made totally outside the collective-bargaining process. Accordingly, the Respondent's contention that this conduct is permissible, gains little support from the Court's opinions in *American National Insurance* and *Katz*, which converge on the principle that the collective-bargaining process is the primary vehicle for establishing working conditions.

The Board, subsequent to the Court's opinions cited above, applied the *Katz* Court's reasoning in *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1972), finding that a bargaining agent is entitled to be consulted prior to the employer's implementing a practice or program of merit increases (to the extent that discretion has existed in determining the amounts or timing of such increases), even if the program was originally developed before the union became the employer's representative.[8]

Implicit in the court's remand to the Board in the present case is the court's perception of tension between the above-mentioned precedents and the deference reviewing courts owe to the Board's role in reconciling the conflicting interests of labor and management.[9] The court's remand contains numerous suggestions for reconciling these conflicting principles, which we have considered along with the relevant precedent and statutory objectives. One of the court's suggested areas for clarification, and the one we find to be the most appropriate and practical, relates to the proper operation of the impasse doctrine.

II. IMPLEMENTATION AFTER IMPASSE DOCTRINE

When an impasse in bargaining is reached, the duty to bargain is not terminated but only suspended.[10] However, the fact of impasse enables the employer to make unilateral changes in working conditions that are ''not substantially different or greater than any which the employer . . . proposed during the negotiations.''[11]

Impasse, in effect, temporarily suspends the usual rules of collective bargaining, by enabling the interjection of new terms and conditions into the employment relationship even though no agreement was reached through the prescribed collective-bargaining process. As the Supreme Court in *Bonanno Linen*[12] observed:

> As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations ''which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'' Furthermore, an impasse may be ''brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process.'' Hence, ''there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways.''

In short, the impasse doctrine is designed, in part, to allow an employer to exert unilateral economic force by establishing new terms and conditions of employment as set out in the employer's bargaining proposals. However, the impasse is always viewed as a temporary circumstance, and the impasse doctrine allowing implementation of employer proposals is legitimated only as

[8] More recently, in *Daily News of Los Angeles*, 315 NLRB 1236, 1239–1241 (1994), in response to a court remand, the Board discussed at length the reasoning of *Oneita Knitting Mills* as it applied to an employer's unilateral *discontinuance* of a merit wage increase system. The Board's decision on remand was enforced by the reviewing court, 971 F.3d 619 (D.C. Cir. 1966).

[9] See, e.g., *NLRB v. J. Weingarten*, 420 U.S. 251, 267 (1975); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987); *NLRB v. McClatchy*, 964 F.2d at 1172.

[10] *NLRB v. Tex-Tan*, 318 F.2d 472 (5th Cir. 1963).

[11] *Atlas Tack Corp.*, 226 NLRB 222, 227 (1976), enfd. 559 F.2d 1201 (1st Cir. 1977).

[12] *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1981).

a method for breaking the impasse. The parties, thus, remain obligated to continue their bargaining relationship and attempt to negotiate an agreement in good faith. The impasse doctrine, therefore, is not a device to allow any party to continue to act unilaterally or to engage in the disparagement of the collective-bargaining process.[13]

We note that the rule permitting implementation after impasse has not been universally applied to allow the implementation of every employer proposal on a mandatory subject. As Judge Silberman observed in his separate statement in this case (964 F.2d at 1177 [emphasis in original]):

> [[I]n *Litton Financial Printing Division v. NLRB*, [501 U.S. 190] (1991), the Court recognized that certain types of proposals—in *Litton* it was an arbitration clause—are contract-dependent and may not be imposed absent consent. See id. at [199-201]. This necessarily means that such provisions are outside not only the ban on pre-impasse unilateral changes at issue in *Litton*, but also the privilege of unilateral implementation *after* impasse.

We do not consider or express judgment about the contract dependent analysis employed by Judge Silberman. But it is important to note that in numerous instances, it is clear that application of implementation after impasse is not permissible regarding specified proposals.[14] In particular, certain contract proposals, in addition to arbitration, constituting mandatory subjects of bargaining—even those that had been agreed to by the same parties in their expired agreements—e.g., union-security and dues checkoff,[15] and no-strike provisions[16] are ''contract bound'' or involve a ''statutorily guaranteed right'' and could not appropriately be unilaterally thrust upon a party without its agreement to be bound. In still another case, the Board and the Court decided that permitting impasse to justify an employer's withdrawal from multiemployer bargaining did not effectuate the statutory objectives.[17]

The above summary of existing precedent is aptly reflected in Judge Edwards' separate statement in this case that (964 F.2d at 1154):

> [T]he [Supreme] Court has ruled that there are certain, limited categorical exceptions (covering the statutory right to strike, extensions of arbitration beyond the term of an agreement, union security, and withdrawal from multiemployer bargaining) which are beyond the scope of the impasse rule.

Indeed, the situation here is analogous to the situation in which the Board is obliged to weigh the right of the parties to a bargaining relationship to reach their own agreement without Board intervention, at least as to their collective-bargaining contract's substantive terms, against the obligation of the parties to proceed in good faith with the process of collective bargaining. The Supreme Court declared in no uncertain terms that the Board may not ''either directly or indirectly . . . sit in judgment upon the substantive terms of collective-bargaining agreements.'' *American National Insurance*, 343 U.S. at 404. Yet, the Board has held, with court approval, that even though a bad-faith refusal to bargain violation may not be based solely on the substantive content of an employer's bargaining proposals, those bargaining proposals can constitute evidence of bad-faith bargaining. See, e.g., *John Ascuaga's Nugget*, 298 NLRB 524, 527 (1990); *Reichhold Chemicals*, 288 NLRB 69 (1988), enf. granted and modified 906 F.2d 719 (D.C. Cir. 1990); *Mar-Len Cabinets*, 243 NLRB 523, 535–536 (1979), enfd. as modified 659 F.2d 995 (1981). It is clear that these various exceptions to the hard-and-fast rules of *Katz* and *American National Insurance* have been found necessary to prevent the gutting of the collective-bargaining process. Thus, the above exceptions to the implementation-after-impasse doctrine carry as their underlying theme the need to foster the collective-bargaining process. This is the theme that we articulate here and apply to the instant case.

In light of the foregoing discussion of the impasse doctrine, it remains for consideration how the Respondent's merit pay proposals, to which the parties had lawfully bargained to impasse, fit into a lawful collective-bargaining relationship. Specifically, were we to allow the Respondent to implement without agreement these proposals, such that the Employer could thereafter unilaterally exert unlimited managerial discretion over future pay increases, i.e., without explicit standards or criteria,[18] the fundamental concern is whether such application of economic force could reasonably be viewed ''as a device to [destroy], rather than [further], the bargaining process.''[19] As explained below, we find that if the Respondent was granted carte blanche authority over wage increases (without limitation as to time, standards, criteria, or the Guild's

[13] See *NLRB v. Crompton-Highland Mills*, supra, 337 U.S. at 224.

[14] See generally *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198–201 (1991).

[15] *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962).

[16] *Southwestern Steel & Supply v. NLRB*, 806 F.2d 1111, 1114 (D.C. Cir. 1986).

[17] *Bonanno Linen*, 454 U.S. at 412.

[18] In all likelihood, the Respondent's method of determining merit increases would not be wholly arbitrary, but under its proposal there would be no need to state during implementation the standards or criteria utilized in setting these increases.

[19] *Bonanno Linen*, supra, 454 U.S. at 412. See also *American Ship Building Co. v. NLRB*, 380 U.S. 300, 309 (1965) (suggesting that bargaining tactics may be analyzed for an inherent tendency to ''destroy the unions' capacity for effective and responsible representation'').

agreement), it would be so *inherently* destructive[20] of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining.

Were we to allow the Respondent here to implement its merit wage increase proposal and thereafter expect the parties to resume negotiations for a new collective-bargaining agreement, it is apparent that during the subsequent negotiations the Guild would be unable to bargain knowledgeably and thus have any impact on the present determination of unit employee wage rates. The Guild also would be unable to explain to its represented employees how any intervening changes in wages were formulated, given the Respondent's retention of discretion over all aspects of these increases. Further, the Respondent's implementation of this proposal would not create any fixed, objective status quo as to the level of wage rates, because the Respondent's proposal for a standardless practice of granting raises would allow recurring, unpredictable alterations of wages rates and would allow the Respondent to initially set and repeatedly change the standards, criteria, and timing of these increases. The frequency, extent, and basis for these wage changes would be governed only by the Respondent's exercise of its discretion.[21] The Respondent's ongoing ability to exercise its economic force in setting wage increases and the Guild's ongoing exclusion from negotiating them would not only directly impact on a key term and condition of employment and a primary basis for negotiations,[22] but it would simultaneously disparage the Guild by showing, despite its resistance to this proposal, its incapacity to act as the employees' representative in setting terms and conditions of employment.

Nothing in our decision precludes an employer from attempting to negotiate to agreement on retaining discretion over wage increases. And, absent success in achieving such an agreement, nothing in our decision precludes an employer from making merit wage determinations if definable objective procedures and criteria have been negotiated to agreement or to impasse. However, the present case represents a blueprint for how an employer might effectively undermine the bargaining process while at the same time claiming that it was not acting to circumvent its statutory bargaining obligation. Where the Guild agrees to grant the employer discretion over wages, or where agreement or impasse on definable objective procedures and criteria provides the basis for unilateral implementation, the Guild retains its ability to act as the employees' bargaining representative. However, by design or default, the Respondent's open-ended, intermittent disruption of collective bargaining by means of the implementation of a proposal for repeatedly shifting wage rates with no objective basis and without the Guild's participation fully bypasses the Guild in its role as employee bargaining representative. Such a result would be antithetical to our statutory system of collective bargaining meant to promote industrial stability.[23]

In sum, it is not the Respondent's bargaining proposal that we view as inimical to the policies of the Act, but its exclusion of the Guild at the point of its implementation of the merit pay plan from any meaningful bargaining as to the procedures and criteria governing the merit pay plan, when the Guild has not agreed to relinquish its statutory role. The impasse in this case occurred not with respect to the establishment of specific working conditions according to the Respondent's proposal, but more generally resulted from the employer's insistence that it not be restricted in exercising its discretion in the overall process of setting wage increases generally. As the Court has stated in *Katz*, the retention of a ''large measure of discretion'' as to merit wage increases allows the Guild to insist on negotiations as to procedures and criteria. 369 U.S. at 746.[24] In the case at hand, no such substantive negotiations ever occurred. We further note that the Respondent's disregard of the Guild's role as employee bargaining representative is reflected not only in its refusal to allow the Guild to negotiate procedures and criteria prior to its implementation of what remained a fully discretionary merit pay plan, but is also further shown by its refusal to provide the Guild with any notice of the forthcoming specific merit wage increases or to allow the Guild any right to participate in any employee appeal of merit pay other than those to which it is invited by the individual employee. Even where such participation would be allowed, the Guild's input could be ignored.

In applying our decision here to the facts of this case, we are preserving an employer's right to bargain

[20] We invoke this phrase from *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), to the same purpose signified there, i.e., to indicate that the conduct carries with it foreseeable consequences that establish, without more, proof of an unlawful motive.

[21] Any forbearance on the Respondent's part in implementing a merit pay increase would not serve to show that its discretion was thereby limited or that the implementation of its full bargaining proposal was thereby retracted.

[22] The paramount importance of wages as a mandatory subject of bargaining is readily demonstrated by its placement at the beginning of the statutory (8(d)) requirement that parties ''confer in good faith with respect to *wages*, hours, and other terms and conditions of employment'' (emphasis added).

[23] Indeed, the Court specifically recognized, in *Katz*, that ''the Board *is* authorized to order the cessation of behavior which . . . directly obstructs or inhibits the actual process of [collective-bargaining].'' 369 U.S. at 747 (emphasis in original).

[24] The Court's rationale in *Katz* strongly suggests that a wholly discretionary merit wage policy (i.e., without identifiable procedures and criteria) does not itself ''establish'' terms and conditions of employment at any point prior to the actual exercise of this discretion in setting discrete wage rates for unit employees. Id. at 746–747. Accord, *Daily News of Los Angeles*, supra, 315 NLRB at 1239–1241.

to impasse over proposals to retain management discretion over merit pay while, at the same time, maintaining the Guild's opportunity to negotiate terms and conditions of employment. In striking this balance, we are mindful of the Supreme Court's admonition that it is not our role ''to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of [our] assessment of that party's bargaining power.'' *American Ship Building Co. v. NLRB*, 380 U.S. 300, 317 (1965). But, as the Court also noted in *American Ship*, it is our responsibility to assure that particular conduct of a party is not ''destructive of collective-bargaining.'' Id at 309. We are confident that this modification of the impasse doctrine will maintain a proper balance, designed to further the bargaining process, between the competing legitimate interests[25] of the parties by preserving the employer's right to propose and bargain to impasse over merit pay and the obligation to provide the employees' statutory bargaining agent with the opportunity for negotiation over the terms and conditions of employment.[26]

ORDER

The National Labor Relations Board reaffirms its Order in the underlying proceeding, 299 NLRB 1045 (1990), and orders that the Respondent, McClatchy Newspapers, Publisher of The Sacramento Bee, Sacramento, California, its officers, successors, and assigns, shall take the action set forth in that Order.

MEMBER COHEN, dissenting.

From the earliest days of the Act, it has been well-established doctrine that a party is free to implement its final offer after reaching a good-faith impasse in bargaining.[1] In the instant case, that is precisely what Respondent has done. Consistent with these established legal principles, I would find no violation. Contrary to these established principles, the Board finds the violation.

The Board has previously reached this result. However, it has failed to persuade the two circuit courts that have considered the matter.[2] My colleagues now try a different rationale to reach the same result. For the reasons set forth below, it is clear that the new effort fares no better than the prior ones.

During bargaining, the Respondent proposed a merit increase system under which it would retain discretion as to the timing and amount of merit increases. My colleagues do not quarrel with the propositions that the proposal was a mandatory subject of bargaining and that the Respondent was free to insist upon the proposal to the point of impasse. As the Supreme Court explained in *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952), collective bargaining can result in fixed terms and conditions of employment *or* in discretion as to terms and conditions of employment. Nor do my colleagues quarrel with the proposition that a good-faith impasse was reached in this case.[3] Finally, my colleagues agree that the Respondent implemented its last proposal, i.e., the one that gave the Respondent unilateral control over merit increases. Notwithstanding all of this, my colleagues somehow find that a violation occurred when the Respondent implemented and acted upon the proposal.

The rule regarding implementation after impasse is grounded in the statute and in sound public policy. Since the employer has satisfied its bargaining obligation (by bargaining to impasse), there is no statutory impediment to employer action. And, as a policy matter, it makes no sense to require the employer to freeze indefinitely the preimpasse status quo. Rather, it makes sense to permit legitimate business changes after bargaining requirements have been fulfilled.

In addition, the freedom to make postimpasse changes is a legal weapon that can be used in bargaining, just as a strike and lockout can be used as weapons.[4] Such weapons are an important part of the bargaining process, and the Board is not to be the arbiter of their use.[5]

My colleagues correctly say that there are exceptions to the rule permitting implementation after impasse. However, these exceptions are few in number, and they pertain to subjects which are clearly different from the one involved herein. Thus, for example, the 8(a)(3) proviso forbids union-security obligations in the absence of a contract. Accordingly, union security cannot be unilaterally implemented, before or after im-

[25] ''[T]he Board should balance 'conflicting legitimate interests'. . . .'' *Bonanno Linen*, supra, 454 U.S. at 416.

[26] Those portions of the Board's earlier decisions in *Hyatt Hotels Corp.*, 296 NLRB 289 (1989), enfd. on other grounds 939 F.2d 361 (6th Cir. 1991), and *Presto Casting Co.*, 262 NLRB 346 (1982), enfd. in part and enf. denied in part on other grounds 708 F.2d 495 (9th Cir. 1983, cert. denied 464 U.S. 994 (1983), that are contrary to the foregoing rationale and the result reached in *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991), and progeny, are hereby overruled.

[1] See Gorman, *Basic Text on Labor Law*, 1976, pp. 445–447; Hardin, *The Developing Labor Law*, pp. 598, 640.

[2] *NLRB v. McClatchy Newspapers*, 964 F.2d 1153 (D.C. Cir. 1992); *Colorado-Ute Electric Assn. v. NLRB*, 939 F.2d 1392 (10th Cir. 1991).

[3] Thus, *NLRB v. Katz*, 369 U.S. 736 (1962), and *Oneita Knitting Mills*, 205 NLRB 500 (1973), are clearly distinguishable. There was no impasse in those cases.

[4] *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965); *Colorado-Ute v. NLRB*, supra; *Brown v. Pro Football*, S.Ct. No. 95–388 (June 20, 1996).

[5] *American Ship Building Co.*, supra.

passe, in the absence of a contract.[6] Further, since checkoff is closely related to unionsecurity, it too has long been held to be unilaterally terminable at the end of the contract.[7] Finally, arbitration is entirely a creature of consent, and thus it terminates upon the expiration of the contract. These ''contract bound'' provisions are different from merit pay provisions. The latter are not dependent upon a contract.

Arguably, a closer analogy to the instant proposal is a no-strike clause. That is, an employer can insist to impasse on such a clause (i.e., the waiver of the right to strike), but it cannot unilaterally impose the waiver even after impasse. By analogy, it can theoretically be argued that an employer can insist to impasse on a discretionary merit pay proposal (i.e., the waiver of the right to bargain about merit pay), but it cannot unilaterally impose the waiver even after impasse. Whatever the possible merit of this argument, it has been rejected by the two courts that have considered it, and my colleagues properly eschew it.[8]

My colleagues rely upon *Great Dane*[9] and contend that the Respondent's proposal is ''inherently destructive'' of the right to bargain. However, the *Great Dane* doctrine pertains to an 8(a)(3) analysis. It is a means of establishing motive where evidentiary proof thereof may be lacking. I fail to see how this 8(a)(3) ''motive'' analysis has anything to do with this 8(a)(5) case which does not turn on motive. In addition, it is difficult to say that the Respondent has ''inherently destroyed'' the right to bargain. It has bargained in good faith on the merit pay proposal. The union was free to strike in opposition thereto. It did not do so, and apparently lacked the bargaining strength to gain a withdrawal of the proposal. Under the law, as explained above, the Respondent was therefore free to implement its proposal after impasse.

My colleagues object to the proposal because of the degree of discretion retained by Respondent with respect to merit pay. However, as *American National Insurance* makes clear, those matters are the stuff of collective bargaining. It is not the business of the Board to judge the proposal. So long as the proposal has been subjected to good-faith bargaining, and impasse has been reached, there is no basis for objecting to its implementation.

In sum, my decision is based upon my respect for the process of free collective bargaining. That process is founded upon the principle of good-faith bargaining, without governmental intrusion, and that process permits parties to act after the bargaining obligation has been met. In deference to that process, I dissent.

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[6] *Bethlehem Steel*, 136 NLRB 1500 (1962).

[7] Id.

[8] *NLRB v. McClatchy Newspapers*, supra; *Colorado-Ute v. NLRB*, supra.

[9] *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).